

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAMELA K. GUNDERSON,

Plaintiff,

v.

MICHAEL J. ASTRUE,

Defendant.

No. C06-1280MJP

ORDER ON SOCIAL SECURITY
APPEAL

Plaintiff Pamela K. Gunderson proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ).

The Court has reviewed the ALJ's decision, the administrative record (AR), and all memoranda of record. Being fully informed, the Court ORDERS that the ALJ's decision be REVERSED. The Court finds that the record supports a determination that Plaintiff is disabled. The Court REMANDS this matter with instructions to the Commissioner to make a prompt determination on whether Plaintiff meets the non-disability requirements for SSI benefits during the relevant time period. Provided that Plaintiff meets the non-disability requirements, she shall be entitled to an immediate award of SSI benefits.

The reasons for the Court's order are set forth below.

Facts and Procedural History

1. Plaintiff's First Application for Benefits

Plaintiff first applied for SSI benefits in 1998. She alleged disability due to back pain, migraines headaches, hypertension, and a stroke. (AR 333.) After her claim was denied, she requested a hearing before an administrative law judge. ALJ Thomas Robinson held a hearing on February 1, 2000, where Plaintiff was represented by counsel.

In a decision issued May 24, 2000, ALJ Robinson found Plaintiff had been disabled since March 6, 1998. (AR 329-38.) Specifically, he found that while Plaintiff could perform light work, she had moderate limitations in concentration and stress tolerance and her headaches and depression would cause work absences of greater than one day per week. Due to these limitations, the ALJ found that she could not perform any work that exists in significant numbers in the national economy.

However, the ALJ also indicated that his decision "specifically does not address non-disability requirements" for SSI eligibility. (AR 337.) He stated:

I note that a person alleging to be the claimant's mother-in-law phoned the agency and indicated that the claimant lived with her "well healed" husband. The claimant testified that she was separated but admitted that her husband earned from \$125,000 to \$150,000 per year. Under these circumstances, it is likely that the claimant has or will have access to income and/or resources beyond the supplemental security income minimums. This should be carefully checked prior to determining eligibility.

Id. The decision also provided that "[t]he component of the Social Security Administration responsible for authorizing Supplemental Security Income payments will advise the claimant regarding the nondisability requirements for these payments, and if eligible, the amount and the months for which payment will be made." (AR at 338.)

2. Termination of Benefits

It is not entirely clear whether Plaintiff demonstrated financial eligibility for SSI benefits after ALJ Robinson's decision. The record includes a letter Ms. Gunderson wrote in December 2001 where she suggests that her SSI payments were terminated because she was also receiving workers'

1 compensation benefits. (AR 362.) Although agency records indicate that her SSI benefits were
 2 terminated in April 2001 (AR 410), the record does not include a copy of her termination notice.

3 3. Second Application for Benefits

4 On August 20, 2001, Ms. Gunderson reapplied for SSI benefits. She was not represented by
 5 an attorney. The application was denied on the grounds that she was not disabled, notwithstanding
 6 ALJ Robinson's decision in May 2000. She requested an administrative hearing.

7 In March 2004, ALJ Arthur Joyner held a hearing on Plaintiff's second application.¹ (AR 658-
 8 82.) Plaintiff appeared pro se. On December 3, 2004, ALJ Joyner issued a decision that found
 9 Plaintiff was not disabled. (AR 27-39.)

10 Plaintiff appealed ALJ Joyner's decision to the Social Security Appeals Council. While that
 11 appeal was pending, Plaintiff retained counsel. On June 30, 2006, the Appeals Council denied review,
 12 making the ALJ's decision the final decision of the Commissioner. (AR 12.)

13 **Analysis**

14 The Social Security Administration follows a five-step sequential evaluation process for
 15 determining whether a claimant is disabled:

- 16 1. At step one, it must be determined whether the claimant is gainfully employed. Here,
 17 the ALJ found that Plaintiff was not gainfully employed.
- 18 2. At step two, it must be determined whether a claimant suffers from a severe
 19 impairment. The ALJ found that Plaintiff suffered from several severe impairments.
- 20 3. Step three asks whether a claimant's impairments meet or equal a "listed impairment."
 21 The ALJ found that Plaintiff's impairments did not meet or equal a listed impairment.
- 22 4. If a claimant's impairments do not meet or equal a listing, the Commissioner must
 23 assess residual functional capacity (RFC) and determine at step four whether the
 24 claimant has demonstrated an inability to perform past relevant work. The ALJ

25 ¹ The record is somewhat ambiguous regarding the date of this hearing. ALJ Joyner's
 decision stated that the hearing was held on March 26, 2004. (AR 30.) The notice of hearing in the
 record also indicates a March 26th hearing date. (AR 40.) However, the transcript from the hearing
 indicates that it was held on March 6, 2004. (AR 658, 660.)

1 assessed Plaintiff's RFC and found that she could not perform her past relevant work,
2 which included work as a groundskeeper/landscaper and retail cashier.

- 3 5. If a claimant demonstrates an inability to perform past relevant work, the burden shifts
4 to the Commissioner to demonstrate at step five that the claimant retains the capacity
5 to make an adjustment to work that exists in significant levels in the national economy.
6 At step five, the ALJ found that Plaintiff could adjust to other work, including work as
7 a parking lot cashier, clerical sorter, or document preparer.

8 Plaintiff alleges that the ALJ committed errors at step two and step five. She also alleges that the ALJ
9 erred in assessing her RFC and in rejecting certain medical evidence. In addition, she argues that the
10 ALJ violated her due process rights and failed to fully and fairly develop the record.

11 A district court's review of an ALJ's decision is limited to whether the decision is in
12 accordance with the law and the findings supported by substantial evidence in the record as a whole.
13 See Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a
14 scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might
15 accept as adequate to support a conclusion. Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989).
16 If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court
17 must uphold that decision. Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002).

18 Here, it should be noted at the outset that ALJ Robinson found that Plaintiff was disabled in
19 May 2000, although he did not determine whether Plaintiff was financially eligible for SSI. In his
20 December 2004 decision, ALJ Joyner stated that ALJ Robinson's decision was the "law of the case,"
21 but found that Plaintiff was no longer disabled because she had "medically improved."

22 The record is unclear regarding any determinations regarding Plaintiff's financial eligibility for
23 SSI benefits following ALJ Robinson's May 2000 decision. At the second hearing in 2004, ALJ
24 Joyner did not explore this issue in any depth. Instead, he asserted that "it appears the claimant never
25 received any SSI payments." However, agency records indicate that Plaintiff's benefits were
"terminated" in April 2001. (AR 410.) Logically, the agency would not have used the word
"terminated" if Plaintiff had never received any SSI payments.

1 The fog surrounding this issue creates significant questions. Although not discussed by either
2 side, the Ninth Circuit has held that a claimant who reapplies for SSI benefits within one year after his
3 benefits are suspended for non-medical reasons is entitled to a presumption of continuing disability.
4 See Warren v. Bowen, 804 F.2d 1120, 1121 (9th Cir. 1986). In such cases, “the applicant need not
5 resubmit evidence of his disability” when he reapplies for benefits. Id. Here, the record appears to
6 indicate that Plaintiff’s SSI benefits were terminated in April 2001 and she reapplied for benefits in
7 August 2001. If Plaintiff’s benefits were terminated in April 2001 for non-medical reasons, it is
8 possible that Plaintiff was not obliged to resubmit evidence of her disability in her second application.

9 Unfortunately, the Court cannot determine from the record why Plaintiff’s benefits were
10 terminated in April 2001. Although the record includes a letter that Plaintiff wrote in December 2001
11 suggesting that her benefits were terminated because she had also been receiving workers
12 compensation benefits (AR 362), the record does not include any Social Security Administration
13 records revealing the reason for the termination. As a result, the Court must put this issue to one side
14 and focus on whether the ALJ’s decision was supported by substantial evidence and free of legal error.

15 1. Due Process Violations

16 Plaintiff’s first argument is that ALJ Joyner violated her due process rights by considering two
17 medical reports that were received into evidence post-hearing without providing Plaintiff with an
18 opportunity to review and respond to those reports. Plaintiff notes that the Social Security
19 Commissioner’s guidelines to ALJs (known as the “HALLEX” guidelines) prohibit this practice.
20 Although Plaintiff acknowledges that the HALLEX guidelines do not have the force of law, she argues
21 that the guidelines reflect basic due process principles.

22 The Court agrees with Plaintiff. The Second Circuit has held that “[u]se of . . . a post-hearing
23 report violates a claimant’s due process rights.” Townley v. Heckler, 748 F.2d 109, 114 (2d Cir.
24 1984). Similarly, the Tenth Circuit has held that “[a]n ALJ’s use of a post-hearing medical report
25 constitutes a denial of due process because the applicant is not given the opportunity to cross-examine

1 the physician or rebut the report.” Allison v. Heckler, 711 F.2d 145, 147 (10th Cir. 1983). In
2 response to Plaintiff’s argument, the Commissioner suggests that there was no due process violation
3 because Plaintiff had the chance to contest the post-hearing evidence when she appealed the ALJ’s
4 decision to the Appeals Council. However, the Commissioner cites no authority to support this
5 contention.

6 Plaintiff suggests that the due process violation should result in an immediate award of
7 benefits. However, Plaintiff provides no authority for this assertion and other courts have rejected
8 arguments that a due process violation compels an immediate award of benefits. See, e.g., Bush v.
9 Commissioner, 2000 WL 1673118 at * 2 (D. Or. Nov. 6, 2000). At most, this due process violation
10 would entitle Plaintiff to a remand for a new hearing.

11 2. The ALJ Did Not Fully and Fairly Develop the Record

12 Plaintiff next argues that ALJ Joyner violated his duty to fully and fairly develop the record.
13 As Plaintiff notes, ALJ Joyner repeatedly noted the absence of medical records regarding Plaintiff’s
14 treatment since her first hearing in 2000. The ALJ appeared to rely on the absence of these medical
15 records to support his finding that Plaintiff had medically improved.

16 The Ninth Circuit has held that “the ALJ has ‘a special duty to fully and fairly develop the
17 record and to assure that the claimant’s interests are considered.’” Widmark v. Barnhart, 454 F.3d
18 1063, 1068 (9th Cir. 2005). “When the claimant is unrepresented . . . the ALJ must be especially
19 diligent in exploring for all the relevant facts.” Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir.
20 2001). “Ambiguous evidence, or the ALJ’s own finding that the record is inadequate to allow for
21 proper evaluation of the evidence, triggers the ALJ’s duty to ‘conduct an appropriate inquiry,’” which
22 may include subpoenaing or submitting questions to the claimant’s physicians, continuing the hearing,
23 or keeping the record open after the hearing to allow supplementation of the record. Id.; see also
24 Widmark, 454 F.3d at 1069 (ALJ violated duty by failing to seek additional evidence to fill perceived
25 gap in record).

1 Here, although Plaintiff offered testimony regarding medical treatment she had received since
2 the first ALJ decision in 2000, ALJ Joyner repeatedly noted the lack of records to support Plaintiff's
3 testimony regarding such treatment. Given Plaintiff's pro se status, the ALJ erred by not making
4 greater efforts to fully and fairly develop the record, such as by subpoenaing medical records or
5 submitting questions to Plaintiff's physicians.

6 3. The ALJ Erred at Step Two in Determining Plaintiff's Severe Impairments

7 At step two of the five-step sequential inquiry, the ALJ determines whether the claimant has a
8 medically severe impairment or combination of impairments. "[T]he step two inquiry is a de minimis
9 screening device to dispose of groundless claims." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.
10 1996). "An impairment or combination of impairments can be found 'not severe' only if the evidence
11 establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to
12 work.'" Id. An ALJ is also required to consider the "combined effect" of an individual's impairments
13 on her ability to function, without regard to whether each alone was sufficiently severe. Id.

14 In this case, the ALJ found at step two that Plaintiff's back impairment, pain disorder, and
15 personality disorders were severe impairments, Plaintiff argues that the ALJ erred because he did not
16 find that her migraines, hypertension, depression, incontinence, and kidney stones were also severe
17 impairments.

18 As Plaintiff notes, the first ALJ's decision from 2000 found that Plaintiff's migraines,
19 depression, and hypertension were all severe impairments. (AR 337.) In the second decision in 2004,
20 the ALJ offered no reason why Plaintiff's hypertension was no longer a severe impairment. The ALJ
21 also offered few reasons why he did not consider Plaintiff's migraines or depression to be severe
22 impairments. The ALJ stated:

23 The record shows the claimant has had little treatment since the last decision when Judge
24 Robinson previously found the claimant disabled with a light work capability but an inability to
25 work due to nonexertional difficulties, namely headaches and depression. However, the
claimant has not provided convincing evidence to support that these conditions have
continued, are disabling, or that she has received any substantial treatment for these

1 impairments since filing her current application. Indeed, her testimony and pain complaints to
2 doctors refer primarily to her back and leg pain with perfunctory mention of headaches and
3 depression. The record simply does not support the claimant's allegations that headaches and
4 depression now prevent her from performing basic work activities.

5 (AR at 36) (internal citation omitted). The ALJ also stated that "I specifically do not find support in
6 the record to find claimant as limited as in the prior decision by headaches" and "[n]or does the current
7 record support a finding that claimant is substantially impaired by depression" Id. Instead, he
8 stated that "I find that she has medically improved since the [2000] decision." Id.

9 The ALJ's determination that Plaintiff's headaches and depression had "medically improved"
10 since the 2000 decision is not supported by substantial evidence. Social Security regulations define
11 "medical improvement" as:

12 Any decrease in the medical severity of [the claimant's] impairments(s) which was present at
13 the time of the most recent favorable medical decision that [the claimant was] disabled or
14 continued to be disabled. . . . A determination that there has been a decrease in medical
15 severity must be based on changes (improvement) in the symptoms, signs, or laboratory
16 findings associated with [claimant's] impairment(s).

17 20 C.F.R. § 416.994a(c). Here, the ALJ did not point to any changes in the symptoms, signs, or
18 laboratory findings regarding Plaintiff's headaches or depression.

19 Instead, the ALJ appeared to base the "medical improvement" finding in significant part on a
20 lack of medical records since the first hearing in 2000. As noted above, this problem could have been
21 corrected if the ALJ had fulfilled his duty to fully and fairly develop the record. Notably, Plaintiff
22 testified at the hearing that she had sought emergency room treatment for a migraine just two months
23 earlier. (AR 670.) This testimony obviously suggests that her migraines continued to be a severe
24 impairment.

25 The ALJ also appeared to base his decision on a perception that Plaintiff had received little
26 treatment for headaches or depression since the 2000 decision. Even assuming that this is true, Social
27 Security rules explicitly require an ALJ to consider reasons why a claimant may have failed to seek
28 treatment. SSR 96-7p provides:

1 [T]he adjudicator must not draw any inferences about an individual's symptoms and their
2 functional effects from a failure to seek or pursue regular medical treatment without first
3 considering any explanations that the individual may provide, or other information in the case
record, that may explain infrequent or irregular medical visits or failure to seek medical
treatment.

4 Here, the ALJ did not ask Plaintiff any questions at the hearing to explain any perceived failure to seek
5 treatment for headaches or depression, despite the fact that these impairments contributed significantly
6 to ALJ Robinson's disability determination in May 2000.

7 The record also includes evidence that Plaintiff suffers from incontinence and kidney stones.
8 The ALJ offered no reason why he did not consider those impairments to be severe, either individually
9 or in combination with her other impairments.

10 Therefore, the Court agrees with Plaintiff that the ALJ erred at step two by: (1) finding that
11 Plaintiff's headaches and depression had medically improved; and (2) failing to offer sufficient reasons
12 why her hypertension, incontinence, and kidney stones were not severe impairments.

13 4. The ALJ Erred in Assessing RFC and Evaluating the Evidence From Plaintiff's Physicians

14 At step four, the ALJ assessed Plaintiff's residual functional capacity (RFC). The ALJ found
15 that Plaintiff retained the capacity to perform a "significant range of light work" – i.e., work that
16 involves lifting up to 20 pounds occasionally and 10 pounds frequently. See 20 C.F.R. § 404.1567(b).
17 The ALJ found that her ability to perform a full range of light work was restricted by postural
18 limitations, including a restriction to jobs that only require "occasional" stooping.

19 Plaintiff argues that the ALJ's RFC assessment was flawed because he improperly rejected
20 opinions from Dr. Clarence Niles and Dr. Todd Czartoski.

21 A. Dr. Niles' Opinion

22 Dr. Niles was Plaintiff's treating physician. In September 2001, he completed a form in which
23 he opined that Plaintiff: (1) had several severe impairments, including back pain, kidney stones, and
24 uncontrolled hypertension; (2) was limited in sitting, carrying, and standing; and (3) would be unable
25

1 to work on a full-time basis for 52 weeks. (AR 562-63.) Plaintiff argues that the ALJ failed to offer
2 sufficient reasons to reject Dr. Niles opinions.

3 “As a general rule, more weight should be given to the opinion of a treating source than to the
4 opinion of doctors who do not treat the claimant.” Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995).
5 If the treating doctor’s opinion is contradicted by another doctor, the ALJ must offer “specific and
6 legitimate reasons” supported by substantial evidence in the record for so doing. Id.

7 Here, the ALJ noted Dr. Niles’ opinions, but did not specifically state whether or why he was
8 rejecting them. Although the ALJ also discussed opinions from other physicians who did not find
9 Plaintiff as limited as Dr. Niles, the Court agrees that the ALJ failed to offer a sufficiently specific
10 explanation as to why he apparently chose to credit the other physicians opinions over Dr. Niles’
11 opinions.

12 B. Dr. Czartoski’s Opinion

13 Dr. Czartoski is an examining physician who saw Plaintiff on March 6, 2004. Although Dr.
14 Czartoski apparently examined Plaintiff before the hearing, his report was not received by ALJ Joyner
15 until after the hearing – thus resulting in the due process problems discussed earlier.

16 In his report, Dr. Czartoski opined that Plaintiff could perform light work. (AR 603.)
17 However, he also opined that Plaintiff should never be expected to stoop. (AR 604.) The ALJ
18 rejected Dr. Czartoski’s opinion regarding Plaintiff’s inability to stoop, stating:

19 [N]o other medical source has limited the claimant to this extent. The consensus of other
20 medical sources shows that the claimant is capable of light work activity. In fact, the medical
21 expert concurred that the claimant is capable of light work, and I accept his opinion. I
therefore find that the record supports that the claimant is able to perform postural activities on
an occasional basis rather than not at all as indicated by Dr. Czartoski.

22 (AR 36) (internal citation omitted.)

23 “The opinion of an examining doctor, even if contradicted by another doctor, can only be
24 rejected for specific and legitimate reasons that are supported by substantial evidence in the record.”
25 Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006). The ALJ’s first reason for not crediting

1 this opinion is simply that “no other medical source has limited the claimant to this extent.” The Ninth
2 Circuit has held that an ALJ cannot reject an examining physician’s opinion for such a vague reason.
3 In Widmark, for instance, the ALJ rejected an examining physician’s opinion regarding the claimant’s
4 ability to perform fine manipulation by stating “[n]o other physician has cited any significant
5 restrictions related to right thumb impairment.” Id. at 1067. The Ninth Circuit noted that “[t]his
6 merely states a fact does not explain – specifically and legitimately or otherwise – how that fact leads
7 to the conclusion that [the examining physician’s] evaluation should be disregarded.” Id.

8 The ALJ’s second reason for rejecting Dr. Czartoski’s opinion is that “[t]he consensus of other
9 medical sources shows that the claimant is capable of light work activity.” However, Plaintiff’s ability
10 to perform the exertional requirements of light work (i.e., lift 20 pounds occasionally and 10 pounds
11 frequently) does not lead to a conclusion that she is able to stoop. Indeed, Dr. Czartoski himself
12 opined that Plaintiff “should be able to return to light duty work” (AR 603), but nonetheless found
13 that she should “never be expected to kneel, crouch, crawl, or stoop.” (AR 604.)

14 As a result, the Court agrees with Plaintiff that the ALJ failed to offer sufficient reasons for
15 rejecting Dr. Czartoski’s opinion about her inability to stoop.

16 Plaintiff suggests that if Dr. Czartoski’s opinion about her inability to stoop is credited, a
17 finding of disabled is mandatory. Plaintiff points to Tyson v. Apfel, 107 F. Supp.2d 1267 (D. Colo.
18 2000), where the court held that Social Security Rule (SSR) 96-9p mandates a finding of disabled if a
19 claimant is unable to stoop. However, the Seventh Circuit has specifically rejected such a reading of
20 SSR 96-9p. See Lauer v. Apfel, 169 F.3d 489, 493 (7th Cir. 1999) (“There is no basis to assert that
21 SSR 96-9p requires a finding of disability in cases where a claimant is unable to stoop.”) Looking at
22 the plain language of SSR 96-9p, the Court agrees with the Seventh Circuit on this point. This rule
23 provides:

24 An ability to stoop occasionally . . . is required in most unskilled sedentary occupations. A
25 *complete* inability to stoop would significantly erode the unskilled sedentary occupational base
and a finding that the individual is disabled would usually apply Consultation with a

1 vocational resource may be particularly useful for cases where the individual is limited to less
2 than occasional stooping.

3 Id. (italics in original) (underlining added). Although SSR 96-9p indicates that an inability to stoop
4 “usually” requires a finding of disabled, it does not mandate a finding of disabled, as Plaintiff and the
5 court in Tyson suggested.

6 5. The ALJ Also Committed Clear Error By Failing to Offer Sufficient Reasons To
7 Reject Plaintiff’s Testimony Regarding Severity of Pain

8 Although not raised by Plaintiff, the ALJ also committed clear error by failing to offer
9 legally sufficient reasons to reject Plaintiff’s testimony about the severity of her pain. At the
10 hearing, Plaintiff testified at length about the pain caused by her impairments and the
11 limitations caused by pain. As the ALJ noted at the hearing, Plaintiff “basically said that she
12 has to rest twice a day for up to two to four hours, one to two hours at a time.” (AR 681).
13 However, the ALJ rejected Plaintiff’s testimony about the severity of her pain, holding:

14 Given the evidence of record, or the lack thereof, the claimant appears to exaggerate
15 her pain. While I find that her back condition does cause some level of pain, the
16 objective evidence does not support the level of pain the claimant alleges to prevent
17 her from performing all physical activities.

18 (AR 36.)

19 Under well-established Ninth Circuit law, “once the claimant produces objective
20 medical evidence of an underlying impairment, an adjudicator may not reject a claimant’s
21 subjective complaints based solely on a lack of objective medical evidence to fully corroborate
22 the alleged severity of pain.” Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991) (en
23 banc). Many Ninth Circuit cases emphasize this rule. For example, in Light v. Secretary of
24 Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997), the court noted that “the
25 ALJ disbelieved Light because no objective medical evidence supported Light’s testimony
regarding the severity of subjective symptoms from which he suffers, particularly pain. An
ALJ may not discredit a claimant’s subjective testimony on that basis.” Instead, “[t]o find

1 that claimant not credible, the ALJ must rely either on reasons unrelated to the subjective
2 testimony (e.g., reputation for dishonesty), on conflicts between his testimony and his own
3 conduct, or on internal contradictions in that testimony.” Id.

4 The Ninth Circuit illustrated this rule in Moisa v. Barnhart, 367 F.3d 882 (9th Cir.
5 2004), where the court noted:

6 Moisa offered evidence demonstrating – and the ALJ found – that Moisa suffered
7 from a series of severe impairments, capable of causing pain. Nevertheless, the ALJ
8 rejected Moisa’s pain testimony solely for lack of objective medical evidence
9 corroborating it. He cited no evidence of malingering and made no findings that
10 would allow us to conclude that he rejected the testimony on permissible grounds,
11 such as a reputation for dishonesty, conflicts between the claimant’s testimony and his
12 conduct, or internal contradictions in the testimony. His rejection of Moisa’s pain
13 testimony was therefore clear error.

14 Id. at 885 (internal citations omitted.)

15 The ALJ made the same clear error in this case. As in Moisa, the ALJ: (1) found that
16 Plaintiff suffered from an impairment capable of causing pain, but nonetheless rejected
17 Plaintiff’s testimony about the severity of the pain solely due to the lack of objective evidence;
18 and (2) cited no evidence of malingering and made no findings suggesting that he rejected her
19 testimony on permissible grounds.

20 Where an ALJ fails to offer sufficient reasons to reject a Plaintiff’s pain testimony, the
21 reviewing court may in proper circumstances credit the testimony as true. The Ninth Circuit
22 has stated:

23 [T]he district court should credit evidence that was rejected during the administrative
24 process and remand for an immediate award of benefits if (1) the ALJ failed to provide
25 legally sufficient reasons for rejecting the evidence; (2) there are no outstanding issues
that must be resolved before a determination of disability can be made; and (3) it is
clear from the record that the ALJ would be required to find the claimant disabled
were such evidence credited.

26 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004). Here, the ALJ clearly failed to
27 provide sufficient reasons for rejecting Plaintiff’s testimony regarding the severity of her pain.
28 In addition, a vocational expert specifically testified at the second hearing that Plaintiff would

1 be unable to perform any jobs if the ALJ accepted Plaintiff's testimony as fully credible. (AR
2 681.) As a result, it is clear from the record that the ALJ would be required to find Plaintiff
3 disabled if her pain testimony were credited as true, leaving no outstanding issues to resolve
4 before making a disability determination.

5 To be sure, Plaintiff did not discuss this error in her brief on appeal. However, the
6 Court may take notice of clear errors not raised by Plaintiff. See, e.g., Silber v. United States,
7 370 U.S. 717 (1962) (in exceptional cases, appellate court may take notice of obvious errors
8 not raised by parties).

9 6. Alleged Errors At Step Five

10 Finally, Plaintiff argues that the ALJ erred at step five because he failed to question the
11 vocational expert (VE) who testified at the hearing about potential conflicts between the VE's
12 testimony and the Department of Labor's Dictionary of Occupational Titles. Although
13 Plaintiff's argument may have merit, it is not necessary to reach this issue because the Court
14 finds that the evidence in the record supports a finding of disabled.

15 7. Remedy

16 Under 42 U.S.C. § 405(g), the Court may enter a judgment "affirming, modifying, or
17 reversing the decision of the Commissioner . . . , with or without remanding the cause for a
18 rehearing." Here, it is apparent that the ALJ's decision must be reversed due to multiple
19 errors. As noted above, it is not necessary to remand for a rehearing if: (1) the ALJ failed to
20 provide legally sufficient reasons for rejecting Plaintiff's evidence; (2) there are no
21 outstanding issues that must be resolved before a determination of disability can be made; and
22 (3) it is clear from the record that the ALJ would be required to find the claimant disabled
23 were such evidence credited. Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004).

24 Among other things, the ALJ failed to provide legally sufficient reasons for rejecting:
25 (a) Plaintiff's testimony regarding the severity of her pain; and (b) Dr. Czartoski's opinion that

1 Plaintiff should never be expected to stoop. In light of these errors, the Court finds no
2 outstanding issues that would need to be resolved before a disability determination could be
3 made. As discussed earlier, the VE testified at the hearing that if the ALJ fully credited
4 Plaintiff's testimony, Plaintiff would not be able to perform any jobs. (AR 681.) While this
5 reason by itself would provide a sufficient basis to find Plaintiff disabled, it should also be
6 noted that: (1) Dr. Czartoski's opinion that Plaintiff is unable to stoop would "usually"
7 require a finding of disabled under SSR 96-9p; and (2) the ALJ failed to offer sufficient
8 reasons to support his finding that Plaintiff's headaches and depression had medically
9 improved since ALJ Robinson's decision in May 2000 – a ruling that ALJ Joyner recognized
10 as the "law of the case" and which had found that Plaintiff was disabled in significant part
11 because her headaches and depression would cause excessive absences from work. As a
12 result, the Court finds that no useful purpose would be served by requiring Plaintiff to
13 undergo another hearing. A rehearing would do little more than add further delay to resolving
14 Plaintiff's application, which was filed six years ago.

15 Although the Court finds that the record supports a disability determination, it is not
16 clear from the record whether Plaintiff meets the non-disability requirements for SSI benefits.
17 That issue was not resolved in either the first or second ALJ decisions; indeed, as noted
18 earlier, Plaintiff's financial eligibility for SSI benefits was questioned (although not decided) in
19 ALJ Robinson's May 2000 decision. Therefore, the Court remands this matter with
20 instructions to the Commissioner to make a prompt determination on whether Plaintiff meets
21 the non-disability requirements for SSI. See, e.g., Steele v. Barnhart, 2007 WL 151224 at * 5
22 (W.D. Va. Jan. 18, 2007) (holding that claimant was disabled but remanding for determination
23 regarding financial eligibility for SSI). Plaintiff shall be entitled to an immediate award of
24 benefits if she meets the non-disability requirements during the relevant period.

Conclusion

The ALJ committed multiple errors in this matter, including but not limited to failing to provide legally sufficient reasons for rejecting Plaintiff's evidence. The Court finds that there are no outstanding issues that must be resolved before a determination of disability can be made and that it is clear from the record that the ALJ would be required to find Plaintiff disabled if such evidence were credited. The Court finds that the evidence in the record supports a determination of disability and ORDERS that the Commissioner's decision be REVERSED. The Court REMANDS this matter with instructions to the Commissioner to make a prompt determination on whether Plaintiff meets the non-disability requirements for SSI benefits during the relevant time period. Provided that Plaintiff meets the non-disability requirements, she shall be entitled to an immediate award of SSI benefits.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: September 7, 2007.

s/Marsha J. Pechman
Marsha J. Pechman
United States District Judge